LAU NGIIK PING & ANOR.

v.

BANK PERTANIAN MALAYSIA

HIGH COURT BORNEO
ABDUL KADIR SULAIMAN JC
[ORIGINATING SUMMONS NO. 1 OF 1990]
3 MAY 1991

CONTRACT: *Intention of the parties - Principle of interpretation - Events on different dates or occasions - Consideration - Whether past consideration - Section 2(d) of Contract Act 1950.*

LAND LAW: *Charge - Loan sum released before signing of memorandum of charge - Whether past consideration - Whether null and void - Charge - Authority to create charge by owner to one of several borrowers.*

Lau Ching Leh, Lau Pik Kiong and Wong Hock Sing (the borrowers) applied for loan from defendant bank to finance their trawler boat project. By letter dated 11 September 1978 the defendants invited the borrowers to their office for the execution of the loan closing and required all collaterals/securities stated in their letter of offer to be submitted for their execution.

By a letter dated 30 September 1978, the plaintiffs authorised and consented to one of the borrowers, Lau Ching Leh, to charge their land in favour of the defendant bank as security for the "loan closing referred to in the letter of 11 September 1978".

On 27 October 1978, the loan agreement was executed between the borrowers and the defendants. Clause 2 of the agreement provided that disbursement of the loan money will be done based on withdrawal schedule from time to time depending on the progress of the project and production of supporting documents. Clause 16 stipulated that the borrowers agreed to provide collaterals/securities for securing the repayment of the loan.

Notwithstanding Clause 2 of the agreement, the whole amount of loan sum was disbursed to the borrowers in one lump sum on 28 October 1978. A month later that is on 27 November 1978, the plaintiffs charged their land to the defendant bank. Preamble of the memorandum of charge stated that the charge was "for the purpose of securing to and for the benefit of the chargee, the loan of Ringgit one Hundred and Fifty thousand only advanced to the borrowers by the chargee pursuant to a loan agreement dated 27 October 1978 ...".

On those facts, the plaintiffs sought principally a declaration that the memorandum of charge registered with the Land Register office was unenforceable, null and void on the ground of total failure of consideration. The ground relied upon being that from the date of execution of the charge until its registration and right up to the date of their application, there has been no advances at all in cash made to the borrowers.

Held:

[1] In dealing with matters such as this, one cannot look at the issue in isolation just because the execution of the loan agreement, the release of the loan and the execution of the charge instrument affecting the lands took place on different dates or occasions. It can be observed that the three events are inter-related and they are linked to one another leading to the episode.

[2] It is reasonable to infer that the defendants required the borrowers to get the plaintiffs to provide the collaterals/securities for the loan on their behalf. Hence the letter of authorisation from the plaintiffs to the defendants authorising and consenting to one of the borrowers to use their land as security for the loan.

[3] The charge could not be in respect of future loan as it clearly stated to be for loan already advanced.

[4] The consideration for the charge over the land cannot be considered as past consideration because the plaintiffs were in the picture at least as early as 30 September 1978 that is a period before the date of the execution of the charge.

[5] It does not matter that authority to charge plaintiffs' land was given only to one of the borrowers as the plaintiff were aware that all the borrowers were involved in the loan transaction.

[6] It was at the desire of the plaintiff that the defendants have agreed to grant the loan to the borrowers and this constitutes good consideration under s. 2(d) Contract Act 1950.

[Application dismissed with costs.]

Case referred to:
Yang Chin Lang v. Tan Chong & Sons Motor Co. Ltd. [1968] 2 MLJ 8 ***(foll)***

Legislation referred to:
Contracts Act 1950 (Act 136), s. 2(d)

For the plaintiffs - Joseph Tang; M/s. Tang & Co.
For the defendants - Chai Jak Min; M/s. Satem, Sagah & Chai

JUDGMENT

Abdul Kadir Sulaiman JC:

Lau Ching Leh, Lau Pik Kiong and Wong Hock Sing (the borrowers) applied for loan from the defendants bank in the sum of RM150,000 to finance their trawler boat project. By a letter dated 11 September 1978, the defendants invited the borrowers to their office for the execution of the loan closing. The letter also requires "All collaterals/securities for the loan as stated in our letter of offer must be also be submitted for our execution".

By a letter of authorization dated 30 September 1978 addressed to the defendants, both plaintiffs authorised and consented Lau Ching Leh, one of the borrowers, to charge the title deeds in respect of two pieces of land belonging to the plaintiffs in favour of the defendants bank as security for the "loan closing referred to in your letter of 11 September 1978".

On 27 October 1978, the loan agreement was executed between the borrowers on the one part and the defendants bank on the other part. Under Clause 2 of the loan agreement the disbursement of the loan money will be done by the defendants based on withdrawal schedule to be drawn up by the defendants and would be paid to the borrowers from time to time depending on the progress of the project and the production of invoices and other documents supporting the withdrawal of the loan.

Clause 16 of the agreement stipulates that for securing the repayment of the loan and interest the borrowers agreed to provide collaterals/securities required by the defendants bank.

Notwithstanding Clause 2 of the agreement, on 28 October 1978, the whole amount of RM150,000 loan was disbursed to the borrowers in one lump sum.

On 27 November 1978, that is a month later, a memorandum of charge was executed and the two plaintiffs as chargors charging the two pieces of land to the defendants bank. The preamble states that the chargors:

> desiring to render the said land available for the purpose of securing to and for the benefit of the chargee, the loan of Ringgit One Hundred and Fifty Thousand only advanced to the borrowers by the chargee pursuant to a loan agreement dated 27 October 1978 entered into between the borrowers and the chargee a copy of which is annexed herewith and do hereby charge to the chargee the said land(s).

On those facts, the plaintiffs by this application sought principally from this Court a declaration to the effect that the memorandum of charge dated 27 November 1978 and registered with the Land Registry Office on 27 July 1984 *vide* Sibu Instrument No. L3851/1984 was unenforceable, null and void. The grounds being that from the date of execution of the charge until its registration and right up to the date of the application, there has been no advance at all in cash made to the borrowers by the defendants and consequently unenforceable for total failure of consideration.

Counsel for the plaintiffs submitted that at the time of signing of the memorandum of charge the full amount of the loan had been paid and nothing in the memorandum of charge to say that the loan was given and released to the borrowers at the request of the plaintiffs. Clause 16 of the loan agreement are matters between the borrowers and the defendants and does not concern the plaintiffs. He further submitted that the money was released by the defendants one day after the signing of the loan agreement without any security and therefore fair to say that the defendants relied on the loan agreement entirely in releasing the loan. The defendants cannot rely on the memorandum of charge as security for the loan as the consideration, if any, is past consideration.

In dealing with matters such as this, one cannot look at the issue in isolation just because the execution of the loan agreement, the release of the loan and the execution of the charge instrument affecting the lands took place on different dates or occasions. Azmi CJ (Malaya) (as he then was) in *Yang Chin Lang v. Tan Chong & Sons Motor Co. Ltd.* [1968] 2 MLJ 8 at p. 10 has this to say:

> In my view on the authority of *Oriental Bank of Malaya Ltd. v. Subramaniam*, the Court in this case may consider the circumstances of the whole case in interpreting the intention of the parties.

Now applying the principle, we would observe that the three events are inter-related and they are linked to one another leading to the episode. The question on security for the loan developed even before the letter of the defendants to the 3 borrowers dated 11 September 1978. If this was not so there would not have been a mention of the collaterals/securities in the letter. Consequent upon the requirement of the defendants it is reasonable to infer that the borrowers got the plaintiffs to provide the collaterals/securities for the loan on their behalf. Hence, there was this letter of authorization dated 30 September 1978 from the plaintiffs to the defendants authorising and consenting to one of the borrowers to use plaintiffs' land as security for the loan. Having satisfied with the conditions for the granting of the loan to the borrowers, the loan agreement was executed on 27 October 1978 incorporating Clause 16 concerning collaterals/securities. The following day the full amount of the loan was released to the borrowers. One would ask as to why the loan was released without any security being given? The answer is in Clause 16 of the loan agreement and importantly the letter of authorization from the plaintiffs. A month later that is on 27 November 1978, the memorandum of charge was executed. The charge could not be in respect of future loan as it clearly states

to be for loan already advanced. Since it is in respect of loan already advanced, can it be said that the consideration for the charge over the land is past consideration? I do not think so as the plaintiffs did not appear suddenly out of the blue. They were in the picture at least as early as 30 September 1978 that is a period before the date of the execution of the charge instrument. It does not matter, in my view, that the authority to charge plaintiffs' land was given only to one of the borrowers instead of to all the three for looking at the authorization letter plaintiffs were aware that in all three borrowers were involved in the loan transaction. In the circumstances, I am of the view that the ground put by the plaintiffs for a declaration that the memorandum of charge was unenforceable, null and void is unconscionable and misconceived. It was at the desire of the plaintiffs as found in the letter of authorization that the defendants have agreed to grant the loan to the borrowers. This under s. 2(d) of Contract Act 195 (Act 136) constitutes good consideration. In the circumstances, the application by the plaintiffs is dismissed with costs.

Also found at [1992] 3 CLJ 1437